122-326

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 203.

THE PHILADELPHIA AND SOUTHERN MAIL STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED NOVEMBER 5, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 The answers of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Appeal.

In the matter of the settlement of the account of the Philadelphia Southern Mail Steamship Company with the Commonwealth of Pennsylvania, as stated by the auditor general of the said Commonwealth April 8th, 1882, for taxes on gross receipts during the years 1877, 1878, 1879, 1880, 1881.

The Philadelphia and Southern Mail Steamship Company appeals from the settlement of the accounts of the said company with the Commonwealth of Pennsylvania, stated by the auditor general on the 8th day of April, 1882, and files the following specifications:

First. Because the gross receipts of the said company were not derived from steamboats owned or operated by the said company during the years 1877, 1878, 1879, 1880, 1881, but that the same were received from steamships engaged in interstate and
2 foreign commerce alone, and not from transportation within the State of Pennsylvania.

Secondly. Because the said company is not a steamboat company, but a steamship company, owning steamships engaged only in interstate commerce, and derived none of the gross receipts upon which the tax has been assessed from steamboats, the class of vessels alone intended to be included in acts of Assembly of March 20th, 1877, and of June 7th, 1879.

Thirdly. Because the said act of Assembly was intended to apply only to corporations owning or operating steamboats, a class of vessels known in commerce as those engaged in river transportation, and not necessarily engaged in foreign or interstate commerce, the word steamship implying a class of vessel necessarily engaged in interstate and foreign commerce, whose business is not taxable under the Constitution of the United States.

Fourthly. Because no part of the said sum of nine thou-
3 sand one hundred and seventy-two dollars — twelve cents is due by the said company to the Commonwealth of Pennsylvania, as the same is a tax on the business of the company during the years 1877, 1878, 1879, 1880, and 1881, consisting entirely of gross receipts for the transportation of passengers and merchandise between different States of the Union and foreign countries, and not within the State of Pennsylvania, and that such a tax is in conflict with the commercial clause of the Constitution of the United States, art. I, section 8 (4), giving to Congress the exclusive right to regulate commerce with foreign nations and among the several States.

Fifthly. Because no part of the penalty or interest on the said tax on gross receipts is due to the Commonwealth, as the officers of the Commonwealth failed to make any demand for a return to the company of gross receipts, and thereby led the company to as-

sume that no claim was made by the Commonwealth for a tax
4 on gross receipts not derived from any business within the Commonwealth.

[Seal of Phila. and Southern S. S. Co.]

S. FLANAGAN, *President.*

Attest: CHARLES S. FIRST, *Secretary.*

(Endorsement on appeal:) Commonwealth of Penna. *v.* Philadelphia and Southern Mail Steamship Company. No. 202. Aug. term, 1882. Appeal. Filed June 3, 1882. Filed in the office of the auditor general the 31st day of May, 1882. Robert S. Frazer, for John A. Lemon.

Narr. and Copy of Account.

In Dauphin Common Pleas, No. 208. Aug Term, 1882.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of the Philadelphia and Southern Mail Steamship Company of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the
5 United States, which they owe to and unjustly detain from her: For that whereas the said defendants, on the 28th day of Feb., A. D. 1882, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of nine thousand one hundred and seventy-two & $\frac{12}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general of this Commonwealth, and duly entered on the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon at the rate of twelve per centum per annum from and after the expiration of two months from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, for a tax on gross receipts, as per act of June 7, 1879, for the years 1877, 1878, 1879, 1880, and 1881, which said account was, on
6 the 5th day of April, A. D. 1882, submitted to, revised, and approved by the State treasurer, and a copy thereof, within thirty days thereafter, sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and unappealed from, whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, parcel of the said sum above demanded; and, being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the

county aforesaid, promised to pay to the said plaintiff, on request, the last-mentioned sum of money.

And whereas, also, the said defendant-, on the day and year
7 in the first count mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendants to and for the use of the said plaintiff, and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general of this Commonwealth against the said defendants, on the day and year in the first count mentioned, for tax on gross receipts, and approved by the State treasurer on the day and year in the first count mentioned.

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request, yet the said defendants have disregarded their said premises, and,
8 although often requested so to do, have not as yet paid any of the said several sums of money, or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars, and, therefore, she brings suit, &c.

ROBT SNODGRASS,
Dep'ty Att'y General,
For HENRY W. PALMER,
Attorney General.

Philadelphia and Southern Mail Steamship Co. in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts per act of 1877 and June 7, 1879, for the years 1877, 1878, 1879, 1880, and 1881, as per report herewith filed:

1877.

Gross receipts for six months ending June 30, $46,920.36.		
Tax at rate of $\frac{8}{10}$ of one per cent.	$372 16	
Int. from Aug. 1, 1877, to Mar. 1, 1882, $204.68; penalty, $37.21	241 89	
		614 05
Gross receipts for six months ending Dec. 31, $105,819.68.		
9 Tax at rate of $\frac{8}{10}$ of one per cent.	846 56	
Int. from Feb. 1, 1878, to Mar. 1, 1882, $414.81; penalty, $84.65	499 46	
		1,346 02

1878.

Gross receipts for six months ending June 30, $91,085.54.		
Tax at rate of $\frac{8}{10}$ of one per cent.	728 68	
Int. from Aug. 1, 1878, to Mar. 1, 1882, $313.33; penalty, $72.86	386 19	
		1,114 87
Gross receipts for six months ending Dec. 31, $113,394.88.		
Tax at rate of $\frac{8}{10}$ of one per cent.	907 16	
Int. from Feb. 1, 1879, to Mar. 1, 1882, $335.64; penalty, $90.71	426 35	
		1,333 51

1879.

Gross receipts for six months ending June 30, $97,381.82.		
Tax at rate of $\frac{8}{10}$ of one per cent.	779 05	
Int. from Aug. 1, 1879, to Mar. 1, 1882, $241.50; penalty, $77.90	319 40	
		1,078 45
Gross receipts for six months ending Dec. 31, $100,243.82.		
Tax at rate of $\frac{8}{10}$ of one per cent.	801 95	
Int. from Feb. 1, 1880, to Mar. 1, 1882, $200.48; penalty, $80.19	280 67	
		1,082 62

1880.

Gross receipts for six months ending June 30, $120,439.57.		
10 Tax at rate of $\frac{8}{10}$ of one per cent.	963 52	
Int. from Aug. 1, 1880, to Mar. 1, 1882, $183.06; penalty, $96.35	279 41	
		1,242 93
Gross receipts for six months ending Dec. 31, $109,523.52.		
Tax at rate of $\frac{8}{10}$ of one per cent.	876 19	
Int. from Feb. 1, 1881, to Mar. 1, 1882, $113.90; penalty, $87.61	201 51	
		1,077 70

1881.

Gross receipts for six months ending June 30, $21,938.52.		
Tax at rate of $\frac{8}{10}$ of one per cent.	175 51	
Int. from Aug. 1, 1881, to Mar. 1, 1882, $12.28; penalty, $17.55	29 83	
		205 34

Gross receipts for six months ending Dec. 31, $7,078.35.
Tax at rate of $\frac{8}{10}$ of one per cent. ---------- 56 63

Due Commonwealth ---------- $9,172 12

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Feb.* 28, '82.

Settled and entered.

ROB'T S. FRASER,
For JOHN A. LEMON,
Auditor General.

TREASURY DEPARTMENT, PA.,
HARRISBURG, 4 *mo.*, 5, 1882.

Approved.

SAM'L BUTLER,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Oct.* 19, 1882.

11 I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

[Seal of the Auditor General.]

THOMAS M'CAMANT,
For JOHN A. LEMON,
Auditor General.

(Endorsement:) No. 208. Aug. term, 1882. Commonwealth of Pennsylvania *v.* Philadelphia and Southern Mail Steamship Company. Narr. and copy of account. Filed Oct. 20, 1882.

Plea.

In the Court of Common Pleas of Dauphin County.

THE COMMONWEALTH OF PENNSYLVANIA
v.
THE PHILADELPHIA AND SOUTHERN MAIL S. S. CO.

The defendants, by Morton P. Henry, their attorney, come
12 and defend the wrong and injury and say that they are not indebted to the said Commonwealth of Pennsylvania in manner and form as the said plaintiff hath alleged, and this they pray may be inquired of by the country.

And for a further plea in this behalf the said defendants, by leave, &c., say that the Philadelphia and Southern Mail Steamship Company were at the time mentioned a steamship company, created by the laws of this Commonwealth of Pennsylvania, operating seagoing steamships engaged in the business of ocean transportation

between different States of the United States and between the United States and foreign countries, and that all the said steamships of the said defendant were duly enrolled or registered under the laws of the United States for the coasting or foreign trade of the United States, and that the gross receipts so returned to the auditor general, upon which a tax has been levied by the Commonwealth of Pennsylvania, were received by defendants for freight and pas-
13 sengers carried in the said steamships on the ocean and on the navigable waters of the United States, between the State of Pennsylvania and other States of the United States, and between States of the United States and foreign countries, and for the charter and hire of the said steamships to other parties in such trade and business, and that no part of the said gross receipts was received for the transportation of freight and passengers between places within the State of Pennsylvania, or for the hire and use of the said steamships within the State of Pennsylvania.

Wherefore the defendants say that they are not liable to pay the said sum of nine thousand one hundred and seventy-two $\frac{12}{100}$ dollars, or any part thereof, to the said plaintiff, in manner and form as the said plaintiff hath alleged, and this they pray may be inquired of by the country.

And for a further plea in this behalf the said defendants say that they are not indebted to the said plaintiff in manner and
14 form as the said plaintiff hath alleged, because they say that the said defendants are and were a steamship company owning and operating steamships, being seagoing vessels engaged in the foreign and coasting trade of the United States, duly enrolled or registered under the navigation laws of the United States, without this, that the defendants were a steamboat company or a slack-water navigation company, or that any of the gross receipts upon which a tax has been assessed were derived from the transportation of goods and passengers within the State of Pennsylvania, and this they pray may be inquired of by the country.

Nov. 3, 1882.

MORTON P. HENRY,
For Defendant.

(Endorsement:) 208. Aug. term, 1882. Commonwealth of Pennsylvania *v.* Philadelphia and Southern Mail Steamship Co. Plea. Filed Nov. 8th, 1882.

15 *Agreement.*

In the matter of the appeal of the Philadelphia and Southern Mail Steamship Company from the settlement of the accounts of the said company for taxes on gross receipts for the years 1877, 1878, 1879, 1880, and 1881, by the auditor general of the Commonwealth of Pennsylvania.

It is agreed that, in lieu of security on appeal required by the act of Assembly of 30 March, 1811, the sum to be entered on appeal ($4,505.92), the balance of the funds remaining in the hands of the

said company, realized from sale and collection of assets, shall be deposited with the Fidelity, Insurance, Trust, and Safe Deposit Company to await the result of the appeal filed in this cause by the Philadelphia and Southern Mail Steamship Company from the settlement of the tax on gross receipts by the auditor general; and in the event of the amount found due to the Commonwealth on the final determination of proceedings under this appeal being equal
16 to or in excess of the said sum so deposited, then the whole amount, with any interest allowed thereon, is to be payable to the Commonwealth of Pennsylvania on the check of the attorney general of the State of Pennsylvania; and in the event of the appeal of the said Philadelphia and Southern Mail Steamship Company being finally successful, then the amount, together with interest, is to be paid by the Fidelity Insurance, Trust, and Safe Deposit Company to the said appellant; and, in like manner, any sum which may be in excess of the amount found due to the Commonwealth shall be paid over to the said appellant, The Philadelphia and Southern Mail Steamship Company.

The said balance is stated by the treasurer as follows:

Balance in hands of the treasurer	$5,195 92
Less certain charges for counsel fees and expenses	600 00
Balance to be deposited with the Fidelity Insurance, Trust, and Safe Deposit Company, to await result of appeal	$4,505 92

17 HENRY W. PALMER,
Attorney General.
MORTON P. HENRY,
Att'y for the Philadelphia and Southern Mail S. S. Co.

Received June 8, 1882, of the Philadelphia and Southern Mail Steamship Company, per M. P. Henry, forty-five hundred and five $\frac{92}{100}$ dollars ($4,505.92), to be held under the above agreement.

R. PATTERSON,
For Fidelity Trust and Safe Deposit Co., Philadelphia.

(Endorsement:) No. 208. Aug. term, 1882. *In re* appeal of the Philadelphia and So. Mail S. S. Co. from sett'l. of ac. for taxes on gross receipts for the years 1877, '8, '9, '80, & '81 by the auditor general. Agreement between the attorney general and Morton P. Henry, att'y for appellant. Filed Nov. 11, 1882.

18 *Agreement as to Facts.*

In the Court of Common Pleas of Dauphin County, Pa.

THE COMMONWEALTH OF PENNSYLVANIA
v.
THE PHILADELPHIA AND SOUTHERN MAIL STEAMSHIP CO.

It is agreed that the following facts shall be treated as proven:
The Philadelphia and Southern Mail Steamship Co. is a corpora-

tion created by the Commonwealth of Pennsylvania, having its principal place of business in the city of Philadelphia.

That the said company was the owner of sea-going steamships operated during the years 1877, 1878, 1879, 1880, and 1881 in the coasting trade of the United States between the port of Philadelphia and the city of Savannah, in the State of Georgia, and in the foreign trade between the ports of New Orleans, Havana (in the Island of Cuba), and Vera Cruz (Mexico), the vessels on the latter voyages touching at Key West, Florida, and that the said vessels
19 were from time to time hired and chartered to other parties, who paid to the defendants a certain price for the hire and charter of the said vessels, paying, victualling, and manning the same at the expense of the charterers.

That all the said voyages were conducted on the ocean and navigable waters of the United States, and the said vessels were at all times duly enrolled or registered under the navigation laws of the United States.

That during the said years the gross receipts of the said company were received for the transportation of freight and passengers between different States of the United States and between ports in the United States and foreign countries, and that no part of the said receipts were derived from transportation of freight and passengers within the State of Pennsylvania.

That the gross receipts of the said company as returned to the auditor general of the Commonwealth were derived from the following sources:

20

1877.		
In 1877, from freight and passage money between the port of Philadelphia and the city of Savannah	$138,815 49	
Do. in foreign trade from New Oleans	16,774 55	
Charter-parties	6,750 00	
		$162,340 04
1878.		
Savannah trade	$146,391 23	
Foreign trade from N. O.	54,721 37	
Charter-parties	3,367 82	
		$204,480 42
1879.		
Savannah trade	$150,650 27	
Foreign trade from N. O.	45,844 13	
Charter-parties	1,131 24	
		$197,625 64
1880.		
Savannah trade	$207.489 47	
Foreign trade	18,623 62	
Charter-parties	3,850 00	
		$229,963 09

1881.

Savannah trade	$13,561 30	
Charter-parties	8,377 20	
		$21,938 50

So that the receipts from interstate commerce between Philadelphia and Savannah were	$656,907 76	
In the foreign trade from New Orleans	$135,963 67	
Charter-parties	23,476 26	

21 ROB'T SNODGRASS,
Dep'ty Att'y General for Commonwealth.
MORTON P. HENRY,
For Defendant.

(Endorsement:) No. 208. Aug. term, 1882. Commonwealth *v.* Phila. & Southern Mail S. S. Co. Agreement as to facts.

Agreement.

In the Court of Common Pleas of Dauphin County. Aug. T., 1882.

COMMONWEALTH OF PENNSYLVANIA
v.
PHILA. & SOUTHERN MAIL STEAMSHIP CO. } No. 208.

It is hereby agreed that a trial by jury be dispensed with in the above-stated case, and that the same be submitted to the decision of the court to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court and to dispense with trial by jury," approved the 22 day of April, 1874, subject, however, to a writ of error as in other causes, at the option of either party.

ROB'T SNODGRASS,
Dep'ty Att'y Gen'l for Commonwealth.
MORTON P. HENRY,
For Defendant.

22 *Opinion. Appeal.*

COMMONWEALTH
v.
PHILADELPHIA & SOUTHERN MAIL STEAMSHIP CO. } 208. Aug. T., 1882.

By the Court:

This case was tried without a jury under the provisions of the act of April 22, 1874. It is an appeal from a settlement made by the auditor general and State treasurer against defendant for tax on gross receipts for the period from Jan'y 1, 1877, to June 30, 1881, under the acts of March 20, 1877, and June 7, 1879.

There is no controversy as to the facts, which are as follows:

Defendant is a corporation of this State, with its principal place

of business in Philadelphia. It owns sea-going steamships, which it employed, during all the period included in the settlement, in the coasting trade between the ports of Philadelphia, in Pennsylvania, and Savannah, Georgia, and in foreign trade between New Orleans, in Louisiana, and Havana, in Cuba, and Vera Cruz, in Mexico,
23 the vessels in the latter voyage touching at Key West, in Florida. All its vessels were duly enrolled or registered under the navigation laws of the United States. Some of these vessels were at times chartered for hire to parties, who victualled and manned them at their own expense. All the voyages were made on the ocean or the navigable waters of the United States. All the gross receipts taxed in said settlement were received for the transportation of freight and passengers between different States of the United States, or between ports of the same and foreign ports, and no parts thereof were received for transportation wholly within the State of Pennsylvania. The freight and passage-money received for transportation between the ports of Philadelphia and Savannah were $656,907.76; between New Orleans and foreign ports, $135,963.67, and for charter-parties $23,467.26. Defendant is not in default for failure to report its gross receipts, and no statement
24 of the amount of tax claimed was sent to it by the auditor general before the settlement was made.

Two objections are specified in the appeal and urged in argument on behalf of defendant against the validity of the tax claimed in this account. It is contended—

First. That the taxing acts do not apply to corporations of the class to which defendant belongs.

And, second. That if these acts are construed to embrace corporations engaged in interstate and foreign commerce they are in conflict with the 3rd clause of the 8th section of article I of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States.

In support of the first objection it is said that defendant is a steamship company and not a steamboat company, and that conveyances of the latter class are, while those of the former class are not, named in the taxing acts. We are not called upon to
25 decide whether the term steamboat companies would embrace defendant or not. It is certainly included within the phrase "every transportation company" "and every other company in any way engaged in the business of transporting freight or passengers." The first objection, therefore, cannot be sustained.

But it is most earnestly and ably contended by the learned counsel for the defendant that these acts, if construed to impose a tax upon the gross receipts of this company, derived from the operations of interstate and foreign commerce, are in conflict with the commercial clause of the Constitution of the United States, and therefore invalid, and an elaborate argument is made to sustain the proposition that the power to regulate commerce, interstate and foreign, "is now held to be exclusive in Congress." This may be conceded, so far at least as this case is concerned, and we may also assume

that if these tax acts, when applied to defendant, amount to
26 a regulation of commerce, they cannot be upheld. The real question therefore is, Do the acts of 1877 and 1879, imposing a tax on gross receipts derived from the operations of interstate and foreign commerce, amount to a regulation of that commerce within the meaning of the Constitution of the United States?

There was a period in the history of the legislation of the State of Pennsylvania taxing corporations, and of the litigation to which it gave rise, when this was a grave question—one that called for and received much discussion from able counsel and learned courts. But that time has passed. The point was decided in the court of last resort, as is clearly shown by "State tax on railway gross receipts," as it is styled, in accordance with the absurd manner of naming cases affected by the then reporter—15 Wallace, 284. That this was the point then decided will be manifest by a comparison of this case with the "case of the State freight tax," 15 Wallace,
27 232, in connection with what is said of each of them in Oberne *v.* Mobile, 16 Wallace, 479, by Chief Justice Chase.

It is not to be denied, and it is fully admitted by the court in these cases, that the distinction between the tax on tonnage and the tax on gross receipts, by which one is held to be a regulation of commerce and the other is decided not to amount to such a regulation, is very shadowy. Nevertheless the line has been clearly drawn by the court along this border land, and it is our simple duty to conform to it without speculating on the chances of its being changed.

It can make no difference in the result that the gross receipts taxed in 15 Wallace were all derived from interstate commerce, whereas in the case before us part of the receipts have accrued from foreign commerce; if the tax is not a regulation of the former, it cannot be of the latter.

This is undoubtedly a very onerous tax, which often presses heavily upon corporations deriving (no) *not* net profits from
28 their gross receipts; but this consideration cannot affect the decision of legal questions. We cannot come to any other conclusion in this case than that defendant is legally liable to this tax.

The interest and penalties charged in the settlement must, however, be struck out. Standard Oil Co. *v.* Carr, 12 W. N. C., 293.

The amount due is:

Tax as per settlement	$6,450 78
Int. June 5, '82, to Jan. 22, '83	489 25
Commission att'y gen'l	322 53
Total	$7,262 56

In our opinion this would have been a proper case for an apportionment of the tax by the accounting officers; but as this does not appear to have been asked for, and as no objection is made to the settlement for the want of an apportionment, and we have not been

asked to make it nor been furnished with data for the purpose, we direct judgment to be entered for the amount of the total above stated, if exceptions be not filed according to law.

29 J. W. SIMONTON, *P. J.*

(Endorsement:) 208. Aug. T., 1882. Commonwealth *v.* Philadelphia and Southern Mail Steamship Co. Opinion. Filed Jan. 23, 1883.

Exceptions.

C. P., Dauphin County. Aug. Term, 1882.

THE COMMONWEALTH OF PENNSYLVANIA
v.
PHILADELPHIA & SOUTHERN MAIL S. S. Co. } No. 208.

Exceptions on behalf of the defendants.

(1.) Because the court erred in entering judgment upon the facts in favor of the plaintiffs.

(2.) Because the court erred in not deciding that the acts of the General Assembly of the Commonwealth of Pennsylvania of March 20, 1877, and June 7, 1879, so far as the same imposes a tax upon the gross receipts of steamships received for the transporta-

30 tion of merchandise and passengers between different States of the United States and between ports of the United States and foreign countries, under the navigation laws of the United States, are in conflict with the commercial clause of the Constitution of the United States, art. I, sec. 8 (4), giving to Congress the exclusive right to regulate commerce with foreign nations and among the several States.

(3.) Because the court erred in not deciding that steamships or vessels engaged in external trade were not included under the denomination of "steamboats" in the said act, the latter class of vessels being those referred to as engaged in the internal commerce of the State.

July 2, 1883.

MORTON P. HENRY,
For Defendants.

And now, by leave of court, the exceptions of the Philadelphia & Southern Mail S. S. Co. are filed as of the 2nd day of

31 February, 1883, are overruled, and judgment is entered for plaintiffs as of the same day *nunc pro tunc* in favor of the plaintiff for the sum of $7,262.56, with interest from January 23, 1883, to be liquidated by the prothonotary, in accordance with the opinion filed Jan. 23, 1883.

J. W. LEMONTON, *P. J.*

(Filed Feb. 17, 1883.)

(Endorsement:) 208. Aug. T., 1882. C. P. Commonwealth *v.* P. & S. M. S. S. Co. Exceptions on behalf of the defendant. Feb. 17th, 1883. By decree of court filed. These exceptions filed as of 2nd of Feb., 1883. E. B. Mitchell, proth'y.

Among the records of the court of common pleas of Dauphin county, Pa., to August term, 1882, No. 208, it is contained as follows, to wit:

Appeal from the Settlement of the Auditor General and State Treasurer.

COMMONWEALTH OF PENNSYLVANIA
v.
THE PHILADELPHIA & SOUTHERN MAIL STEAMSHIP COMPANY.

Appearance. Docket entry. August term, A. D. 1882. Palmer,

JUNE 3, 1882.

32 June 3, 1882.—Appeal and specifications of objections filed.
Oct. 20th, 1882.—Narr. and copy of account filed.
Nov. 8, 1882.—Plea filed.
Nov. 10, 1882.—Agreement to deposit $4,509.92 in Fidelity Insurance, Trust, & Safe Deposit Co. to await result in lieu of bond filed.
Dec. 19, 1882.—Agreement filed to dispense with trial by jury, and to submit to the decision of the court, reserving the right to a writ of error.
Jan. 23d, 1883.—Opinions and findings of court filed, deciding that there is due the Commonwealth by the defendant the sum of seven thousand two hundred and sixty-two & $\frac{56}{100}$ dollars ($7,262.56). Exit notice.
Feb. 2, 1883.—Writ of error from the supreme court received and filed.
Feb. 17, 1883.—And now by leave of court the exceptions of defendant are filed as of the 2nd day of February, 1883, and
33 are overruled, and judgment is entered for plaintiff as of same day *nunc pro tunc* in favor of the plaintiff for the sum of $7,262.56, with interest from Jan. 23, 1883, to be liquidated by the prothonotary in accordance with the opinion filed Jan. 23, 1883.
Same day judgment entered accordingly.
(Certificate omitted by the proth'y of common pleas of Dauphin county.

[Seal of the Court of Common Pleas of Dauphin Co.]

Writ of Error.

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania, Middle Dist.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Because in the record and process and in rendering the judgment in a certain plaint which was in our said court before the judges of the same court by our writ between the Philadelphia & Southern Mail Steamship Company, plaintiff in error, and the Com-
34 monwealth of Pennsylvania, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the same plaintiff in error

we have received information, we, — willing that if any error be therein it should be corrected and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process, and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 21st Monday foll. 1 Mon. of Jan., 1883, being the first Monday of the term, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable Ulysses Mercer, doctor of laws, chief justice of our supreme court, at Harrisburg, the 27th day of
35 January, in the year of our Lord, one thousand eight hundred and eighty-three, and of the Commonwealth the one hundred and seventh.

WILLIAM PEARSON, *Prothonotary.*

(Endorsement:) No. 17. May term, 1883. Supreme court, middle district. The Philadelphia & Southern Mail Steamship Company, plaintiff in error, *v.* the Commonwealth of Pennsylvania, defendant in error. Writ of error to the court of common pleas for the county of Dauphin. (No. 208. Aug. term, 1882.) Returnable the 21 Mon. foll. 1 Mon. of Jan., 1883. Rule on the defendant in error to appear and plead on the return day of the writ. N. B.—20 days' notice to the parties or counsel below is necessary to compel an appearance.

I certify that recognizance in error in $100.00 with Henry
36 Winson and Stephen Flannagan as bail has been filed in the supreme court. William Pearson, prothonotary.

The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send, as within we are commanded.

——— ——— [L. S.]

(The judge of the court of C. P. of Dauphin county has omitted to sign this.)

Filed in Dauphin C. P. Feb. 2, 1883.

Filed in supreme court April 13, 1883.

In the Supreme Court of Pennsylvania, sitting in and for the Middle District of Said Court, *ss.*

At a supreme court of the State of Pennsylvania in and for the middle district of said court, at the city of Harrisburg, Penna., on the 21st Monday following the 1st Monday of January, 1883.

Present: The Honorable Ulysses Mercer, chief justice, and
37 Isaac G. Gordon, Edward M. Paxson, John Trunkey, James P. Sterrett, and Silas U. Clark, justices, and William Pearson, prothonotary of said court.

Among the records of the said supreme court of Pennsylvania in and for the middle district to May term, 1883, No. 17, it is contained as follows, to wit:

Writ of Error to the Court of Common Pleas of Dauphin County. Aug. Term, 1882.

THE PHILADELPHIA & SOUTHERN MAIL STEAMSHIP COMPANY, Defendant below, Plaintiff in Error,
v.
THE COMMONWEALTH OF PENNSYLVANIA, Plaintiff below, Defendant in Error.
No. 208.

Docket entries.

1883, Jan. 27.—*Præc'e*, aff., & recog. filed *eo die*. Exit writ of error r't'ble 21 Mon. foll. 1 Mon. of Jan., 1883.
1883, April 13.—Record returned and filed.
1883, June 1.—Argued.
1883, Oct. 1.—Judgment affirmed.

Per MERCER, *C. J.*

1883, Oct. 5.—Record remitted to C. P. of Dauphin Co.
1883, Oct. 17.—Writ of error from the Supreme Court of the United States received and filed.
1883, Nov. 1.—Order for security for costs and bond filed; certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District. 1776.]

38 WILLIAM PEARSON, *Prothonotary.*

Præcipe, Affidavit, & Recognizance.

In the Supreme Court for the Middle District of Pennsylvania.

THE PHILADELPHIA & SOUTHERN MAIL STEAMSHIP CO., Plaintiff in Error,
v.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Issue writ of error to the court of common pleas of Dauphin county, returnable to the next return day.
(Aug. T., 1882. No. 208.)

MORTON P. HENRY,
Att'y for Pl'ff in Error.

S. Flannagan, being duly sworn, says he is the president of the Philadelphia & Southern Mail S. S. Co.; that the writ of error in this case is not taken for the purpose of delay.

S. FLANNAGAN, *President.*

Sworn to and subscribed before me this 26 day of Jan., A. D. 1883.

[Seal of Notary Public.]

ARCHER M'LEAN,
Notary Public.

39 *Ser. Writ of Error to the Court of Common Pleas of Dauphin County.*

In the Supreme Court of Pennsylvania for the Middle District.
Aug. T, 1882.

THE PHILADELPHIA & SOUTHERN MAIL STEAMSHIP CO., Plaintiff in Error,
v.
THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error. } No. 208.

PHILADELPHIA COUNTY, *ss:*

We, Henry Weierson and Stephen Flannagan, of Philadelphia, Penna., severally acknowledge ourselves to owe and be indebted — the above named, The Commonwealth of Pennsylvania, in the sum of one hundred dollars, upon condition that the above-named plaintiff in error prosecute their writ with effect, and if judgment or decree entered therein be affirmed, or the same be discontinued or *non prossed* to pay all costs that have accrued or shall accrue upon said writ of error, together with the costs, for the return to the court below of the record, with the remittitur.

HENRY WIERSON.
40 S. FLANNAGAN.

Taken and acknowledgedged this 30th day of Jan., A. D. 1883.
HAROLD P. NEWLIN,
Dep. Proth'y.

(Endorsement:) No. 17. May term, 1883. Phila. & Southern S. S. Co., plaintiff in error, *v.* Commonwealth of Pennsylvania, defendant in error. Præ., aff., & recog. for writ of error to common pleas of Dauphin county. Filed Jan. 25th, 1883.

Assignments of Error.

1. Because the court erred in entering judgment upon the facts in favor of the plaintiff.

2. Because the court erred in not deciding that the acts of the General Assembly of the Commonwealth of Pennsylvania of March 20, 1877, and June 7, 1879, so far as the same imposed a tax upon the gross receipts of steamships, received for the transportation of merchandise and passengers between different States of the United States and between ports of the United States and foreign
41 countries, under the navigation laws of the United States, are in conflict with the commercial clause of the Constitution of the United States, article I, section 8 (4), giving to Congress the exclusive right to regulate commerce with foreign nations and among the several States.

(3) Because the court erred in not deciding that steamships or vessels engaged in external trade were not included under the denomination of "steamboats" in the said act, the latter class of vessels being those referred to as engaged in the internal commerce of the State.

Opinion of the Supreme Court.

Middle District. Error to Common Pleas of the County of Dauphin.

PHILADELPHIA & SOUTHERN MAIL STEAMSHIP CO.
v.
THE COMMONWEALTH.

MERCER, *C. J.:*

The plaintiff in error is a corporation of this State; its principal place of business is in Philadelphia; it is a transportation
42 company; it owns sea-going steamships, which it employs in the coasting trade between the port of Philadelphia and the ports of cities in other States and in other countries; the voyages are made on the navigable waters of the United States and on the ocean; its vessels are enrolled and registered under the navigation laws of the United States; its gross receipts were received for the transportation of freight and passengers between the different ports named.

The tax in question was imposed on gross receipts under the acts of 20th of March, 1877, and of June 7th, 1879.

It was urged that the acts imposing taxation do not apply to a corporation of the class of the plaintiff in error. We think this position clearly untenable. Whether it be a steamship company or a steamboat company is wholly unimportant. It is clearly a transportation company engaged in the business of transporting both freight and passengers. It is thus brought clearly within the letter of the statute imposing the taxes.

43 It is further contended that if the acts are held to apply to this corporation they are in conflict with that clause of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States." If a tax on gross receipts were the same as a tax on tonnage there would be force in this position. The laying of a tax on tonnage is an attempt to regulate commerce. It bears directly on the owners of the goods who are having them transported. A tax on gross receipts is a tax on the money of the carrier after it has reached the treasury of the corporation. The fact that it may have been derived from the transportation of freight between States, or between the home port and a foreign port, matters not. It has, nevertheless, become subject to legitimate taxation. The statute does not look beyond the corporation to those whose business have furnished the money which passed into its treasury. It looks
44 no further than to determine whether the business of the corporation brings it within the statute for purposes of taxation. Whenever the fruits of the transportation have become mingled with the general property in the treasury the fund is subject to taxation by State authority. The Tax on Gross Receipts, 15 Wall., 284; in Osborne *v.* Mobile, 16 Id., 481.

A tax on gross receipts is in the nature of a tax on the franchise. It is solely by the exercise of the franchise granted by the Commonwealth that the corporation obtains the money on which this tax is

imposed. It matters not where the money is gathered. The corporation obtained all its powers here; its principal office is here. The Commonwealth which breathed into this corporation the breath of life has power to impose taxes on the product of its own creation. Insurance Co. of North America *v.* Com., 6 Norris, 132; Com. *v.* Gloucester Ferry Co., 2 Ont., 105.

We do not deem it necessary to refer to and answer *seriatim* the numerous cases cited by the plaintiff in error. We do not
45 think they controvert the cases we have cited and the reasons on which they rest.

The learned judge arrived at a conclusion with which we are entirely satisfied.

Judgment affirmed.

(Endorsement:) No. 17. May T., 1883. Philadelphia and Southern Mail Steamship Company *v.* The Commonwealth. Error to common pleas of the county of Dauphin. Judgment affirmed. Mercur, C. J. Green, J., dissents. Filed Oct. 1, 1883.

Remittitur.

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

[Seal of the Supreme Court of Pennsylvania, Middle District.]

Whereas by virtue of our writ of error from our supreme
46 court of Pennsylvania in and for the middle district, returnable in the said court on the 21 Mon. foll. 1 Mon. of Jan., in the year of our Lord one thousand eight hundred and eighty-three, a record was brought into the same court of a judgment rendered against The Philadelphia and Southern Mail Steamship Company, plaintiff in error, at the suit of The Commonwealth of Pennsylvania, defendant in error, and it was so proceeded in our supreme court that the said judgment was affirmed, and the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the act of Assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain:

Wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Hon. Ulysses Mercur, chief justice of our su-
47 preme court, at Harrisburg, the 5th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

WILLIAM PEARSON,
Prothonotary.

(Endorsement:) No. 17. May term, 1883. Supreme court of Pennsylvania. The Philadelphia & Southern Mail Steamship Company, plaintiff in error, *v.* Commonwealth of Pennsylvania, defendant in error.

Remittitur to Dauphin County.

And now here on this day, to wit, Oct. 17, 1883, the said The Philadelphia & Southern Mail Steamship Co. produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid, so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the second Monday of October next, which writ of error is in the words and of the tenor following, to wit:

48 *Order of Chief Justice of Supreme Court of Pennsylvania Requiring Security to be Entered for Costs.*

In the Supreme Court of Pennsylvania, Middle District. May Term, 1883.

THE PHILADELPHIA AND SOUTHERN MAIL STEAMSHIP CO., Plaintiff in Error, *v.* THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error. } No. 17.

And now, October 23, 1883, the plaintiffs in error, by Morton P. Henry, their attorney, ask for an order to be made directing security to be given for costs only on the allowance of the writ of error from the judgment of the court in this cause to the Supreme Court of the United States to be entered *nunc pro tunc* as of the 12 day of October, 1883, the date of the requiring of the citation, in accordance with section 1000 of the Revised Statutes U. S., such allowance not to operate as a supersedeas of further proceedings in said cause.

And thereupon such order is made, security to be given for costs only in the sum of $500, the sureties to be approved by the
49 prothonotary of the supreme court, eastern district, on notice to the attorney general.

ULYSSES MERCUR,
Chief Justice.

(Endorsement:) In the supreme court of Penna., middle district. May term, 1883, No. 17. The Phila. & Southern Mail S. S. Co., pl'ff in error, *v.* Commonwealth of Penna., defendant in error. Filed Nov. 1, 1883.

Bond.

Know all men by these presents that we, The Philadelphia and Southern Mail Steamship Company and William D. Winser and John C. Darrah, both of the city of Philadelphia, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of five hundred dollars, lawful money of the United States of

America, to be paid to the said obligee or their attorney; to which payment, well and truly to be paid, we do bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and
50 severally, firmly by these presents.

Whereas, lately, at a court of common pleas of Dauphin county judgment was entered against the said The Philadelphia and Southern Mail Steamship Company at the suit of the Commonwealth of Pennsylvania of Aug. term, 1882, No. 208, which judgment was afterwards affirmed by the supreme court of Pennsylvania in a certain plea and suit in said court of May term, 1883, No. 17, and the said The Philadelphia and Southern Mail Steamship Company have obtained a writ of error to the Supreme Court of the United States to reverse the said judgment rendered in the last-above entitled action:

The condition of this obligation is such that if the above-bounden obligors shall pay all costs which have accrued, or which may hereafter accrue, in the said cause upon the said writ of error or otherwise, then the said obligation to become void; else to remain in full force and effect.

Witness our hands and seals this thirtieth day of October,
51 in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Phila. & Southern Mail S. S. Co.]

Attest: CHARLES S. TERL, *Sec'y.*
WILLIAM D. WINSER. [L. S.]
JOHN C. DARRAH. [L. S.]

Sealed and delivered in the presence of us—
HAROLD P. NEWLIN.
JAMES M. WILCOX, JR.

The above-named securities, William D. Winser and John C. Darrah, are hereby approved.

HAROLD P. NEWLIN,
Dep. Proth'y, S. C. of Pa., E. D.

STATE OF PENNSYLVANIA, }
City & County of Philadelphia, } ss:

On this thirtieth day of October, A. D. 1883, before me, the subscriber, Charles S. Green, prothonotary of the supreme court for the eastern district of Pennsylvania, personally appeared ths above-named William D. Winser and John C. Darrah, and who, being severally sworn according to law, did depose and say, each
52 for himself, respectively, as follows: The said William D. Winsor, that he is the owner of property in the State of Pennsylvania worth over and above all its liabilities five thousand dollars; the said John C. Darrah, that he is the owner of property in the

State of Pennsylvania worth over and above all its liabilities five thousand dollars.

[Seal of the Supreme Court of Penna., E. D.]

WILLIAM D. WINSER.
JOHN C. DARRAH.

Sworn and subscribed before me the day and year aforesaid.
HAROLD P. NEWLIN,
Dep. Proth'y.

Endorsement: No. 17. May term, 1883. Bond. The Philadelphia and Southern Mail S. S. Co. *et al.* to the Commonwealth of Pennsylvania. $500 for costs. Filed Nov. 1, 1883.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and judges of the supreme court of the Commonwealth of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Philadelphia and Southern Mail Steamship Company, plaintiffs in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the
54 decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Philadelphia and Southern Mail Steamship Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom
55 of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this — day of October, A. D. 1883, and in the 108th year of the Independence of the said United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk Circuit Court U. S., East. Dist. of Penna.

56 [Endorsed:] The Philadelphia and Southern Mail S. S. Co., pl'ff in error, *vs.* The Commonwealth of Pennsylvania, def't in error. Writ of error to supreme court of Pennsylvania. Filed in the supreme court of Pennsylvania, middle dist., 17th Oct., 1883. Wm. Pearson (Derby dep.), proth'y, &c.

57 THE UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, instant, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the middle district, wherein The Philadelphia and Southern Mail Steamship Company are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ulysses Mercur, chief justice of the supreme court of Pennsylvania, this twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-three.

ULYSESS MERCUR,
Chief Justice.

58 Service accepted for the def't in error.
Oct. 24. 1883.

LEWIS C. CASSIDY,
Att'y General of Pa.

59 In pursuance thereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

STATE OF PENNSYLVANIA:

In testimony that the foregoing, contained on pages one to fifty-six, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately depending therein, to No. 17 of May term, 1883, middle district,

wherein The Philadelphia and Southern Mail Steamship Company was plaintiff in error and the Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this 29th day of October, A. D. 1883.

[Seal of the Supreme Court of Pennsylvania, Middle District. 1776.]

WILLIAM PEARSON,
Prothonotary of Supreme Court of Penna., Middle Dist.

60 [Endorsed:] Supreme Court of the United States. Transcript of record. The Philadelphia and Southern Mail Steamship Co., pl'ff in error, *v.* The State of Pennsylvania, defendant in error. In error to the supreme court of the Commonwealth of Pennsylvania.

Endorsed on cover: Pennsylvania supreme court. No. 203. The Philadelphia & Southern Mail Steamship Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed 5th November, 1883.

122-326

Office Supreme Court U. S.
FILED.
FEB 21 1887
JAMES H. McKENNEY,
CLERK.

No. 203. *October Term, 1886.*

IN THE

Supreme Court of the United States.

The Philadelphia and Southern Mail Steamship Company, Plaintiffs in Error,

vs.

The Commonwealth of Pennsylvania, Defendants in Error.

Error to the Supreme Court of Pennsylvania.

Brief on behalf of The Philadelphia and Southern Mail Steamship Company, Plaintiffs in Error.

MORTON P. HENRY,
For Plaintiffs in Error.

Dando Printing and Publishing Company, No. 34 South Third Street.

In the Supreme Court of the United States.

The Philadelphia and Southern Mail Steamship Company, Plaintiffs in Error	October Term, 1886.
vs.	No. 203.
The Commonwealth of Pennsylvania, Defendants in Error.	

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

CONCISE ABSTRACT OR STATEMENT OF THE CASE.

The question involved is the right of the State of Pennsylvania to impose a tax on the gross receipts of The Philadelphia and Southern Mail Steamship Company, a corporation of that State.

The tax was on the gross earnings of the steamship company in the years 1877, 1878, 1879, 1880 and 1881, under Acts of Assembly, imposing a tax of eight-tenths of one per cent. on the gross receipts of the company from ocean freights of the steamships of that company, received for carrying freight and passengers; and aggregating for those years on voyages between Philadelphia and Savannah . $656,907 76
In the foreign trade of the United States from
New Orleans 135,963 67
And from charter parties of the vessels . . 23,476 26

The freights were received exclusively from inter-state and foreign trade by vessels of the company registered or enrolled under the navigation laws of the United States, and no part of the receipts were derived from the transportation of freight or passengers within the State of Pennsylvania.

See agreement as to facts, Record, pages 7, 8 and 9.

The case was tried upon an agreed state of facts, without a jury, in the Common Pleas of Dauphin County, Pennsylvania, on appeal taken by the company from a settlement made by the Auditor-General and State Treasurer of the State, charging the company with a tax at the rate of eight-tenths of one per cent., amounting to $6450.00, which, with interest and penalties, amounted to $9172.12.

By agreement with the Commonwealth, the company deposited the remainder of its assets with The Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, to abide the result of the appeal from the taxation. (See Record, pages 6 and 7.)

The Court of Common Pleas of Dauphin County affirmed the validity of the tax, striking off the interest and penalties, and gave judgment for $7262.56, which judgment was affirmed on a writ of error taken by the defendants to the Supreme Court of the State of Pennsylvania, the highest court of law and equity of that State, from which judgment of the Supreme Court of Pennsylvania this writ of error was taken to the Supreme Court of the United States.

The Act of Assembly of March 20, 1877 (Section 5), under which this tax was imposed, was in the following words:

"That every railroad company, canal company, steamboat "company, slackwater navigation company, transportation "company, street passenger railway company and every

"other company now or hereafter incorporated by or under "any law of this commonwealth, or now or hereafter incor- "porated by any other State and doing business in this com- "monwealth, and owning, operating or leasing to or from "another corporation or company, any railroad, canal, slack- "water navigation or street passenger railway or other device "for the transportation of freight or passengers, or in any "way engaged in the business of transporting freight or pas- "sengers, and every telegraph company incorporated under "the laws of this or any other State and doing business in "this commonwealth, and every express company, and any "palace-car and sleeping-car company, incorporated or unin- "corporated, doing business in this commonwealth, shall pay "to the State Treasurer, for the use of the commonwealth, a "tax of eight-tenths of one per centum upon the gross re- "ceipts of said company for tolls and transportation, tele- "graph business or express business."

The Act of Assemby of June 7, 1879 (Section 7), is similar to the Act of 1877.

By the terms of these acts, returns of the gross receipts are required to be made every six months to the Auditor-General, upon which the tax is assessed by the Auditor-General and charged against the company.

Specification and Assignment of Errors.

I.—Because the Supreme Court of the State of Pennsylvania erred in not deciding that the Acts of Assembly of the Commonwealth of Pennsylvania, of 20th March, 1877, and June 7, 1879, so far as they attempt to impose a tax of eight-tenths of one per cent. on the gross receipts of The Philadelphia and Southern Mail Steamship Company, received for the transportation of merchandise and passengers, on the

high seas, between ports in different States of the United States and between ports of the United States and foreign countries, in steamships registered and enrolled under the navigation laws of the United States, are in conflict with the commercial clause of the Constitution of the United States, Article I, Section 8 (4), giving to Congress the exclusive right to regulate commerce with foreign nations and among the several States, and with the second clause of the tenth section of the same article, which prohibits the States, "without the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws."

II.—Because the Supreme Court of the State of Pennsylvania erred in deciding that the State of Pennsylvania could lawfully impose a tax on the gross receipts of its corporations derived from transportation in inter-state and foreign commerce, conducted on the high seas in vessels owned by such corporations, duly registered and enrolled under the navigation laws of the United States.

III.—Because the Supreme Court of the State of Pennsylvania erred in not reversing the judgment on the facts agreed upon and directing judgment to be entered for the plaintiff in error.

Brief of Argument.

The question presented is a single one, whether the gross receipts of vessels of the United States, engaged in the coastwise and foreign trade, and duly registered and enrolled under the laws of the United States, can be taxed by the State, and whether such taxation is not a regulation of commerce which is forbidden to the States, although the vessels whose gross receipts are taxed were owned by a corporation of Pennsylvania.

The relation of a corporation to the State which creates it cannot affect the question, for it is now finally decided that the restriction of the commercial clause of the Constitution applies equally to commerce conducted by corporations as to that by individuals.

The cases are numerous and uniform, from the *dictum* in *Paul* vs. *Virginia*, 8 Wall. 168, to the latest case of *The Gloucester Ferry Co.* vs. *Pennsylvania*, 114 U. S. 196, in which this court, reversing the decision of the Supreme Court of Pennsylvania, *held* that inter-state commerce conducted by corporations is entitled to the same protection against State exactions which is given to such commerce when carried on by individuals.

The reasoning, in the opinion of the Supreme Court of Pennsylvania, therefore, which places the right of taxation in this case upon the absolute power of control by the State over the corporation which exists by its authority (Record, page 18), as in the words of that court, "The commonwealth which breathed into this corporation the breath of life has power to impose taxes on the product of its own creation," is now definitely overruled, and commerce conducted by corporations is equally under the protection of the commercial clause of the Constitution as that by individual citizens. See also opinion in The State Tax on Railway Gross Receipts, 15 Wallace, at page 293: "We think it may safely be asserted "that the states have authority to tax the estate, real and "personal, of all their corporations, including carrying com- "panies, precisely as they may tax similar property when be- "longing to natural persons and to the same extent."

The claim to maintain this tax on ocean freights is mainly sustained by the court below on the authority of the case of The State Tax on Railway Gross Receipts.

That case, decided in 1872, involved the validity of a tax upon the gross receipts of the Reading Railroad Company, a Pennsylvania corporation owning a railroad at that time extending from the coal fields of Pennsylvania to Philadelphia,

the seaport of that State, and operated wholly within the State.

This court *held* a tax on the gross receipts of such a railroad, although partly derived from coal intended to be exported from the State, not to be a violation of the Federal Constitution, because it was a tax upon the franchise of the corporation in the nature of an excise, "being a graduated contribution, proportioned either to the value of the privilege granted or to the extent of their excise, or to the results of such exercise." Three of the judges of this court dissented from the opinion of the majority. It is mainly upon expressions found in the opinion of the majority, delivered by Mr. Justice Strong, that the Supreme Court of Pennsylvania sustains the validity of this tax, because such a tax is in the nature of a tax on the franchise, measured by the receipts from transportation levied on moneys of the carrier after it has reached the treasury of the corporation.

The case of the Erie Railway, 21 Wall. 492, was also a tax by the State of Pennsylvania on the gross receipts of the Erie Railway Co. earned within the State of Pennsylvania. The corporation created by New York became a Pennsylvania corporation by legislative authority to construct a railroad through the State of Pennsylvania, but the State only claimed and was allowed to tax that part of the gross receipts which was earned within the State of Pennsylvania. The gross receipts subject to taxation were ascertained by the proportion of the road operated in Pennsylvania, 42½ miles, to the whole length of the road, 455 miles.

1. **This tax is not a tax on a franchise exercised by the company under the authority** of the State of Pennsylvania. The ownership and employment of vessels is not a franchise. While, therefore, the State of Pennsylvania can create a corporation authorized to own a vessel, it is by virtue only of a license from the United States under the navigation laws that such vessel can enter into the foreign or coastwise trade, and such a trade is not one which the State

can authorize the vessels so owned to engage in. The State creates the franchise to be a corporation, and limits its purposes to the employment of vessels. No franchise was required from the State to enable the vessels of the corporation so created to enter into the coastwise and foreign trade of the United States. But the right to do so was conferred by the registry and enrollment of these vessels under the laws of the United States.

See Morowitz on Corporations, Sec. 535.
The Railroad Co. *vs.* Maryland, 21 Wallace, 456.

In Sinnot *vs.* Davenport, 22 How. 227, this court decided that the license granted by the United States to vessels enrolled in the coasting trade could not be abridged by any statute of a State imposing additional restrictions or obligations on the vessel-owners while navigating the waters of that State; and that any additional requirements beyond those required by the navigation laws of the United States was a regulation of commerce forbidden by the Constitution.

So that while in the case of the taxation of the gross receipts of the Reading R. R. Co. the tax is supported as a tax on the franchise of the corporation carrier, measured by the gross receipts of the railroad within the State; a tax on the gross receipts of the steamships owned by this corporation, earned in the foreign and coastwise trade, can in no respect be treated as a tax on a franchise conferred by the State, and cannot be supported unless the State could tax the gross receipts of vessels of individual ship-owners, whose property or occupation is subject to the laws of the State by reason of domicile.

The distinction between trade conducted on the public waters of the United States and the internal trade by railways is put with clearness in the subsequent case of *The Railroad Company* vs. *Maryland*, 21 Wallace, page 470, in the opinion of the court, which is as follows:

"Commerce on land between the different States is so strikingly dissimilar in many respects from commerce on the

water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal Government. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial highway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. *No franchise is needed to enable the navigator to use them.* Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National Legislature, so *that State interference* with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation on land."

The tax on gross receipts of the Baltimore & Ohio R. R. was sustained; because the construction of highways is an essential attribute of the government which establishes the roads, canals and bridges of their community, which duty it can place in the hands of its corporations, and as the State could exact the tolls if itself the owner of the works built for such public purpose; it can take such share of the tolls as it may deem proper, from the corporation which exercises the public franchise by its authority or as its delegate within the State. In a subsequent part of the opinion, page 472, the court distinguishes such a tax from a tax on the trade or commerce of a common carrier and recognizes the refusal of the right to tax the latter as "It is a tax because of the transportation, and is, therefore, virtually a tax on the transportation and not in any sense a compensation therefor or for the franchises enjoyed by the corporation that performs it."

This view of the authority under which the State can tax the receipts of railroads within their own boundaries has no connection with a claim to take the gross freights of their

corporations or their own citizens using the highway of the seas for which no franchise is required, and the right to exercise State taxation for transportation by water is expressly denied in the opinion quoted.

In New Eng. Fire Ins. Co. *vs.* Robinson, 25 Ind. 536, it was *held*, that in relation to the business of insurance conducted by corporations, that such a business was not a corporate franchise, and that any person might engage in it unless forbidden by law, and that therefore the act of incorporation by the State of Massachusetts was not the guide to ascertain the extent and validity of its contracts as an insurer in another State.

And similarly as to patents granted by the United States and held by corporations.

In Grover & Baker Sewing Machine Co. *vs.* Butler, 53 Ind. 454, it was *held*, that provisions respecting foreign corporations, requiring them to comply with certain conditions as a prerequisite to transact business, did not apply to a foreign corporation owning a patent right and engaged solely in the manufacture, use and sale of patented articles. It was said in that case:

"The question arises, was that right, so held by appellant, "a foreign corporation, affected in any manner by the pro- "visions and requirements of the law of this State before "mentioned, respecting foreign corporations and their agents "in this State? * * * * If the patentee complies with "the law of Congress on the subject, he has a right to go "into the open market anywhere within the United States "and sell his property. If this were not so, it is easy to see "that a State could impose terms which would result in a "prohibition of the sale of this species of property within its "borders." * * * *

This was affirmed in Shook *vs.* The Singer Manufacturing Co., 61 Ind. 520.

The like point was held by Mr. Justice Davis in *Ex parte* Robinson, 2 Biss. 309.

2. If this is not a tax on the franchise, it is clearly a tax on the occupation or business of ship-owners, carried on by the company under the laws of the United States and not of Pennsylvania.

This act is not a classification of subjects of taxation, but it is a tax on certain occupations, only, when conducted by corporations, while it is left free to individuals.

It is not a tax on property, although the decision appealed from—cites the language of Judge Strong, in delivering the opinion of this Court, speaking of the gross receipts of railroads, to support it as such.

Such an apposition of a sentence, used to illustrate one subject, as authority for an assertion to which it is entirely inapplicable, is found in the dialectics of other systems besides jurisprudence.

The expressions were used by that learned Judge to discriminate between the tax on the franchise of the carrier company, measured by the number of tons of coal carried in inter-state transportation, which was *held* to be in effect a tax on commerce—and the tax on the gross receipts in money, from the same coal—which were *held* not to be a tax on the coal carried, but on the exercise of the franchise, measured by the money value of the franchise to the carriers, derived from its exercise *within the State.*

So that while coal carried, which was the property of other persons, could not be the subject of tax, the money derived from its carriage, which was the property of the carrier, was a standard of measurement. The words used by this Court for this one purpose are applied with a literalism unusual with the courts of last resort—to support this tax as a tax neither on the occupation nor the franchise—but on property in the shape of money in the treasury of the corporation.

This view finds no justification in the decisions of this Court, nor of the State Courts, including those of the Supreme Court of Pennsylvania.

In this Court—in the Provident Institution *vs.* Massachusetts, 6 Wallace, at p. 630—the tax on the deposits in a savings bank, part of which was invested in securities of the United States, was *held* not to be a tax on the property held by the Institution—but on the capacity of the Institution to exercise the privileges conferred by the charter.

As a question of property, the Court points out that the deposits in a savings bank can no more be a standard of property for the purpose of taxation than the gross receipts from a steamer, which are consumed in the earning in wages, fuel and provisions. The language is: "The valuation of property has nothing to do with determining the amount of the tax; but the amount depends on the average amount of deposits for the six months preceding the respective days named, and it is quite obvious that there is no necessary relation between the average amount of the deposits and the amount of the property owned by the Institution."

In the case of The Railroad Co. *vs.* Maryland, 21 Wallace, 456, the opinion is inconsistent with the expressions used in the case of The Tax on Gross Receipts, in 15 Wallace. The tax was sustained, not because it was assessed on moneys in the treasury of the company, but because it was on the public franchise creating the company a highway of the State. If it was a property tax there was nothing to discuss on the subject of that decision, and the court expressly decided that the occupation of a carrier as such in inter-state commerce could not be taxed.

In Massachusetts, the Commonwealth *vs.* Provident Institution, 12 Allen, 312, a tax measured by the gross receipts from deposits was *held* not to be a property tax, but a tax on the franchise or occupation.

In Connecticut, the same thing was *held* in Coit *vs.* The Society for Savings, 32 Conn. 173, and affirmed in this Court. 6 Wallace, 594.

In Maine, a tax measured by the gross receipts of a railroad was *held* not to be a property tax, but on the franchise. State *vs.* The Railroad, 74 Maine, 376.

In Maryland, a tax on the gross receipts of a railroad was held not to be a property tax, and clearly a franchise tax.

State *vs.* P. W. & B. R. R. Co., 45 Md. 361. In this case the language of this Court in 15 Wallace was quoted and commented upon, but that decision was construed to mean rightly, that the gross receipts of the Reading R. R. Co. were *held* to be the measure of the enjoyment of the State franchise.

In Pennsylvania—Philadelphia Contributionship *vs.* Commonwealth, 98 Penna. S. R. 48—a tax levied by the State on the net income of its corporations was *held not* to be a property tax. It was contended by the plaintiff in error, a Fire Insurance Company, that its income, derived from investments in bonds of the United States, could not be taxed, because the bonds themselves could not. The court decided that it could be sustained not as a tax on property or other receipts of the company, but as a tax on the corporate franchise, measured by its net earnings, citing the case above referred to in 6 Wallace.

Nevertheless, when the same question again comes before the court in the present case, in order to sustain the present tax, the Supreme Court of Pennsylvania apply literally the words quoted from that case in 15 Wallace, rejected in the cases above cited to sustain their view that even if transportation or commerce on the high seas is not within the limits of state taxation, the gross receipts derived from it are. So that while foreign inter-state commerce itself cannot be taxed or regulated, the proceeds of such transportation may be, in the same manner as the other moneys of the carrier can be, taxed after they have come into his possession. That is to say, if it is a tax laid on moneys, all further inquiry is stopped by the supposed rule of the decision in the case of The Tax on Gross Receipts.

If this can be sustained as the rule for the interpretation of State taxation under the commercial clause; the question of the validity or invalidity of a tax becomes a question of the words employed in drafting the statute, in the same way as

in a deed, words of limitation have been used to effect objects which are forbidden, when attempted by words of strict condition. It is inconsistent with the rule which requires the court to look at the mischief and the remedy in construing the language of a constitution or a statute.

The commercial clause was intended to render commerce free from all State control or interference. Whatever authority may regulate may forbid it.

M'Culloch *vs.* Maryland, 4 Wheaton, 368.

This power of forbidding, by the exercise of that of taxation, is carried into effect by the taxation of currency of State banks not a part of the national system.

It is an axiom in construing this clause that the constitutionality or unconstitutionality of a state tax is to be determined not by the form or agency through which it is to be collected, but by the subject on which the burden is laid.

The Bank of Commerce *vs.* New York City, 2 Black. 620.

The Bank Tax Case, 2 Wall. 200.

Society for Savings *vs.* Coite, 6 *ibid.* 594.

Provident Bank *vs.* Massachusetts, 6 *ibid.* 611.

The illegality of a tax demanded from the master for every passenger landed, in Henderson *vs.* The Mayor, 92 U. S. 259, and of the license fee required from peddlers who dealt in foreign goods, in Welton *vs.* Missouri, 91 U. S. 275, and analogous cases, are instances of the application of this axiom to the effect of State legislation.

Nor does it affect the application of this principle, that the tax is not laid directly on the individual freighter dealing with the carrier corporation, if it is a tax on the occupation which the State cannot regulate or control.

In Crandell *vs.* Nevada, 6 Wall. 35, the tax was laid on the owners of the stage coach and not on the passenger himself. And in The State Freight Tax, 15 Wall. 232, the assessment was on the company carrying the coal and not on the coal itself. (See also in Pickard *vs.* The Pullman Southern Car Company, 117 U. S. 34.) In none of these cases was the

tax assessed on the freighter or passenger, but on the carrier, whose occupation was protected under the limitation of the Federal Constitution.

As it was the commerce or intercourse between the different States and with foreign countries which was to be protected, the States surrendered their right to tax their own citizens and corporations, as well as those of other States where such taxation became a regulation of commerce. It was intended to protect communities formed under one government—and not merely the individuals—from State interference, that it applies to all except the purely internal commerce of the States.

A State which interferes with the commercial transactions of its own citizens with those of other States, affects both communities; and a denial of, or an interference with, the right of its own citizens to trade with those of other countries or States, like an embargo, regulates and interferes with the commerce of all other countries. It may now be affirmed, since the decision of the case of The Gloucester Ferry Co. *vs.* The State of Pennsylvania, that corporations and individuals are on the same plane in relation to the restrictions of commercial intercourse between the States, and that the taxation on intercourse or traffic which is forbidden is equally so, whether imposed on a citizen or a corporation of the State, or of another State; of which an authoritative instance may be cited in the case of The Steamboat Co. *vs.* The Port Wardens, 6 Wall. 31, where certain exactions in the shape of port charges by the State of Louisiana were held to be illegal as to a corporation of that State, as a regulation of commerce.

And the same ruling was made by the Circuit Court of the District of California in the case of The Pacific Coast Steamship Co. *vs.* The Board of Railroad Commissioners, 18 Fed. Rep. 10, decided by Mr. Justice Field and Sawyer, C. J. In this case the Railroad Commissioners of California were authorized by law to establish rates for transportation of freight and passengers, and were restrained by injunction

from attempting to regulate or interfere with the rates of The Pacific Coast Steamship Co., a corporation of California, as to its trade, foreign and inter-state, including that conducted between ports of the same State, which in effect extended beyond the limits of the State, conducted in its vessels duly licensed and enrolled in the coasting trade under the acts of Congress.

As taxation on property in the treasury of the company, the gross receipts of a vessel are not a measure of the property of the owner, although considered such for the purpose of ascertaining the extent of the franchise enjoyed by a corporation. Such moneys become the property of the shipowner in the same sense that the deposits in a bank are the property of the bank, although representing a debt due to the depositors, not the capital of the bank. The gross receipts cannot be treated as earnings from the use of property, as the largest part is consumed in earning them. The gross receipts at any other port than the home port never come into the hands of the owners. The vessel is disbursed at the foreign port, and the net results only are remitted to the owners. They are not in fact paid into the treasury, but appear only in account. And it would be as fallacious to say that the moneys of a bank paid in by depositors, the sales of the products of a factory or of a mine, or the number of tons of coal purchased and consumed each six months for its business, are a measure of their property owned for the purposes of taxation, as that the gross receipts of a steamship, of which the greater part are consumed in fuel, wages and provisions.

It is not suggested that independently of the Federal inhibition a legislature cannot impose such taxes on its citizens and corporations as it may think fit, as a measure of taxation on a business or occupation, or *even* exact tribute in the shape of an assessment, but it is claimed that it cannot, by such mode or device of assessment, escape its constitutional obligations and thus tax such commercial transactions as are prohibited by the Constitution.

Such a tax is a burden which the State imposes upon the ship-owner in the use of his license from the United States to carry on the foreign and coasting trade under the Federal authority. Sinnot *vs.* Davenport, *ante.* No form or mode of assessment, whether by requiring it to be paid to the States the moment it is received, or to account for it at the end of every six months, can alter its effect as a tax on the trade. It cannot be brought within any of the principles in which a community can exact tribute for the protection of a trade or occupation within its limits, although extending beyond its borders, as in Osborne *vs.* Mobile, 16 Wall. 470, or exact fees for privileges extended by the States in aid of the commerce of a port, as in wharfage, pilotage and quarantine regulations. But the State attempts in this manner to support its government by taxing a trade which it cannot authorize, and in relation to which Congress has taken the sole control.

It comes within the principle which treats a stamp tax required on every bill of lading as substantially and in effect a tax on imports and exports by the State. (Almy *vs.* California, 24 How., p. 169.) It is, as described in the language of this Court, in the Railroad Co. *vs.* Maryland, 21 Wall. p. 470, "a tax because of the transportation, and is therefore virtually a tax on the transportation, and not in any sense a compensation therefor, or for the franchises enjoyed by the corporation that performs it."

It is respectfully urged that such a tax as this imposed by the State of Pennsylvania is a tax not only on the trade of its own ports, but on that of ports of other States, such as that on the trade from New Orleans to foreign countries, returned and included in this assessment of this company. No form of expression in the act or mode of assessment can alter its effect as a tax on the foreign and inter-state trade of the United States.

MORTON P. HENRY,

For the Philadelphia and Southern Mail Steamship Co., Plaintiffs in Error.

122-326

FILED
MAR 18 1887
JAMES H. McKENNEY,
CLERK.

No. 203. *October Term, 1886.*

IN THE

Supreme Court of the United States.

The Philadelphia and Southern Mail Steamship Company, Plaintiffs in Error,

vs.

The Commonwealth of Pennsylvania, Defendants in Error.

Error to the Supreme Court of Pennsylvania.

Additional Assignment of Error and Brief on behalf of The Philadelphia and Southern Mail Steamship Company, Plaintiffs in Error.

MORTON P. HENRY,
For Plaintiffs in Error.

Dando Printing and Publishing Company, No. 34 South Third Street.

In the Supreme Court of the United States.

The Philadelphia and Southern Mail Steamship Company, Plaintiffs in Error,	October Term, 1886.
vs.	No. 203.
The Commonwealth of Pennsylvania, Defendants in Error.	

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

ADDITIONAL ASSIGNMENT OF ERRORS.

IV. Because the tax if intended as a tax on moneys, the property of the defendant corporation is in violation of the XIV. Amendment of the Constitution of the United States in the following words:

"No State shall make or enforce any law which shall "abridge the privileges or immunities of citizens of the United "States; nor shall any State deprive any person of life, liberty "or property without due process of law, nor deny to any "person within its jurisdiction the equal protection of the law."

Additional Brief on this Point.

The tax levied in this case, if not assessed on the franchise cannot be supported as a tax on the property of the corporation.

Because it is a tax on moneys earned from transportation by companies, when the same moneys earned by individuals are not taxed by the State.

Corporations are within the protection of this clause, as well as individuals. Santa Clara County *vs.* South Pacific R. R., 118 U. S. R., 394.

As a tax on property—it taxes that of a ship owner which is a corporation resident in Pennsylvania, when that of an individual ship owner is not taxed.

This amendment adopted in 1868, was not referred to in the case of *The Tax on Gross Receipts* in 15 Wallace, decided in 1872.

Possibly the effect of this amendment was not as fully adverted to. If it was, it is an additional reason for supposing that the expressions of Mr. Justice Strong, which it is claimed treat this as a property tax, were used by him, as is contended in the argument presented in this case, to discriminate between that decision and the previous one in the State Freight Tax.

The case under the XIV. Amendment comes within the express rule of the decision of the Circuit Court for the District of California, *County of San Mateo* vs. *Southern Pacific R. R. Co.*, reported in 13 Fed. Rep., 722; that the property of corporations must be taxed under this clause, in the same manner as that of individuals.

The question has not yet reached a decision in this Court.

The opinion of Mr. Justice Field in the Circuit Court covers all that suggests itself on that point, if this can be considered a property tax.

There was no law in Pennsylvania in force when this tax was imposed, taxing in the same manner the occupation of all carriers by water, on his moneys derived from such carriage.

While in the case of a tax on the gross receipts of railroads the taxation might be treated as a classification of subjects for taxation which would only call for equalization between all railroads, because a certain description of land transportation by common carriers is conducted exclusively by corporations.

The same cannot be said of carriage by water, where the greater amount of tonnage is owned by individuals, and except in the case of steamers, the vessels rarely owned by corporations.

MORTON P. HENRY,

For Phila. and Southern Mail Steamship Co.

122-826

APR 5-1887

JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States

NO. 203 OCTOBER TERM, 1886.

THE PHILADELPHIA AND SOUTHERN MAIL STEAMSHIP COMPANY,

Plaintiffs in Error,

VS.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

Brief of Argument on Behalf of the Commonwealth of Pennsylvania.

W. S. KIRKPATRICK,
Attorney General.
JOHN F. SANDERSON,
Deputy Attorney General.

FREE PRESS PRINT, EASTON, PA.

In Supreme Court of the United States.

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THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

October Term, 1886.

No. 203.

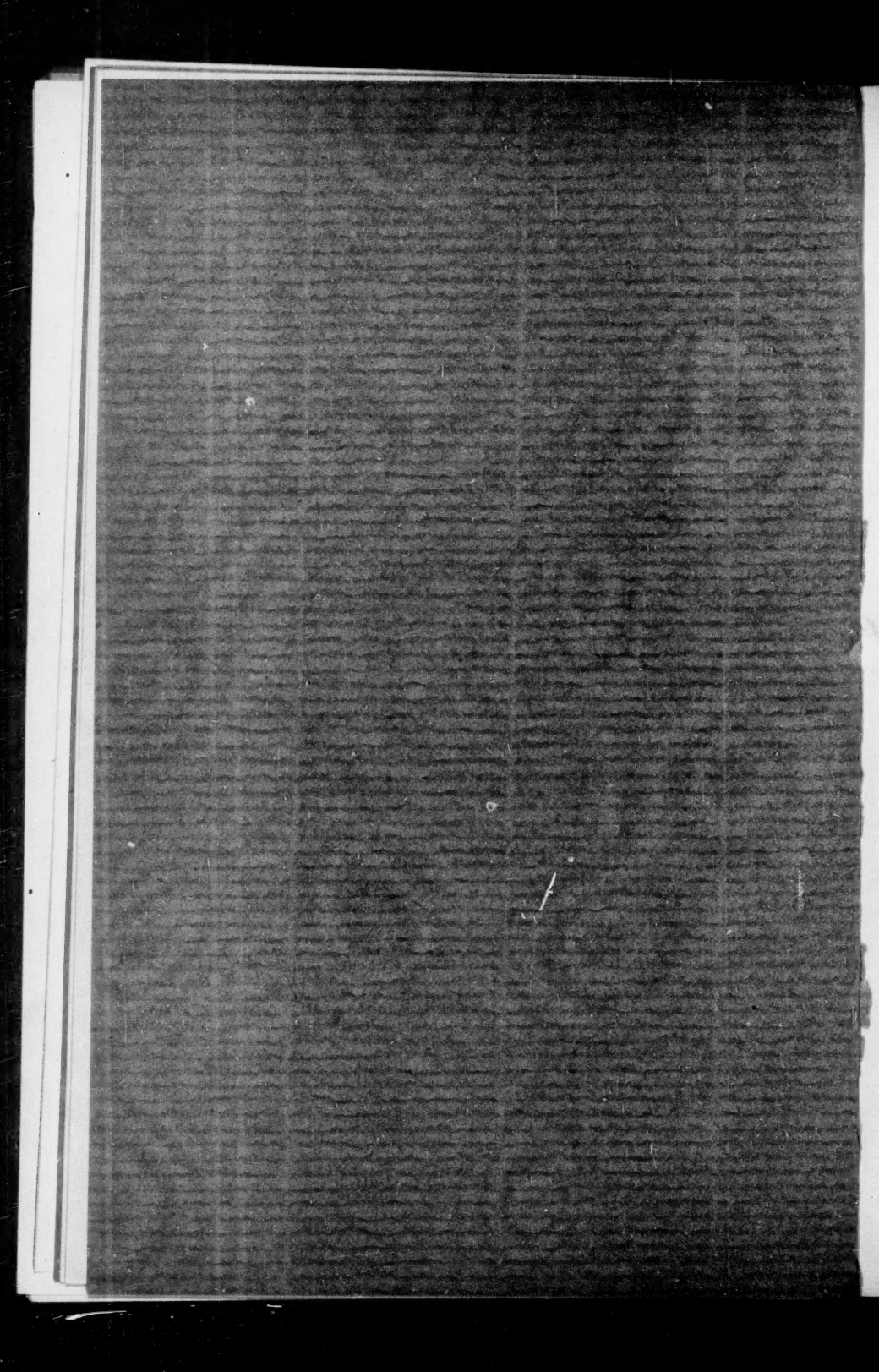
BRIEF OF ARGUMENT FOR THE COMMONWEALTH OF PENNSYLVANIA.

The Philadelphia and Southern Mail Steamship Company is a domestic corporation incorporated by the State of Pennsylvania, by Act of Februrary 1st, 1866, (P. L., 7) for "the transportation of goods, wares and merchandise and the transportation of mails and passengers by means of steam navigation to and from the city of Philadelphia."

This company had its principal place of business in the city of Philadelphia, in said State of Pennsylvania.

The facts are substantially as set forth in the statement of the case by the Plaintiff in Error.

The sole question in the present case is, can a corporation which receives its franchises from the State of Pennsylvania be taxed by



In Supreme Court of the United States.

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This company had its principal place of business in the city of Philadelphia, in said State of Pennsylvania.

The facts are substantially as set forth in the statement of the case by the Plaintiff in Error.

The sole question in the present case is, can a corporation which receives its franchises from the State of Pennsylvania be taxed by

that State upon the basis of its gross receipts, although earned in inter-state and foreign commerce?

I.

The relation of the corporation to the State does certainly affect the question. If a domestic corporation, it is the creature of the State, a resident of the same, and deriving its privileges from such State.

A foreign corporation deriving its franchises from extra territorial authority is not subject to taxation thereon, and is only taxable as to its property whose *situs* is within the limits of the taxing State.

The tax in question is sustainable upon the assumption that it is a tax upon the franchises of the corporation, such corporation being the creature of the taxing power, having its principal place of business within the limits of the State creating it, and its franchises being a valuable interest, property or commodity subject to taxation.

Let us understand what is meant by the franchises of the corporation in the present case.

It is true that no incorporation is necessary to enable a person or persons to enter into commerce coastwise, foreign, or internal upon the rivers of the State.

The franchise, however, in the present case, is to engage in the business of navigation and trade in a corporate form, with the usual advantages and privileges of a body corporate.

Just as a number of persons may be incorporated to engage in manufacturing, or the business of express carriage, or as carriers upon the internal waters of the State.

Can it be said that the State cannot tax these corporations upon their franchises and adopt any basis of adjustment, whether it be their gross receipts or net earnings or a gross sum in the shape of a bonus or a license tax? And may not the franchises of these

corporations be taxed, although private individuals pay no occupation tax for the exercise of similar employments?

It is not the business or occupation that is contemplated as being taxed, but the thing, property or interest spoken of as the franchises, and the return of gross receipts and assessment thereon is only one method of adjusting and ascertaining the amount of franchise tax to be paid.

A tax upon a corporation is ordinarily a tax, excise or duty upon the privilege of doing business in a corporate form, and this has always been considered as an excise on a "commodity" within the meaning of a constitutional provision authorizing the Legislature to impose taxes and raise a revenue upon "commodities, etc.," being within the State. Portland vs. Apthorp, 12 Mass., 252; Comm. vs. Peoples Five Cent Bank, 5 Allen, 431.

As was said in Society for Savings vs. Coite, 6 Wallace, 606: "Corporate franchises are legal estates vested in the corporation itself as soon as it is in *esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation upon the possession of its franchises, and whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises."

The privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much the legitimate subject of taxation as any other property of the citizen which enjoys the protection and is within the control of the sovereign power of the State. Provident Institution v. Mass., 6 Wall. 623.

By section 10 of the Act of June 7, 1879, P. L. of Pa., p. 118, a three per centum tax is imposed on the net earnings of certain classes of corporations, and it was held in Philadelphia Contributionship for Insurance, etc., v. Comm., 2 Ot., 48, that the said tax is not laid upon the money and receipts of such corporations, but upon their franchises, the amount of the net earnings or income being

resorted to simply as a just measure of the tax that should be paid for the enjoyment of those franchises, and it was further held that all corporations coming within the provisions of the above Act are therefore bound to pay annually to the commonwealth the fixed per centum rate upon all their income, even though part thereof may be derived from loans of the United States, or from loans of this Commonwealth, which by the acts authorizing their issue are expressly made payable free of State taxes.

The right of a corporation to exist and exercise the powers vested in it by its charter is called its franchise. Burroughs on Taxation, p. 164, § 85.

In Minot v. The Philadelphia, Wilmington & Baltimore R. R. Co., 18 Wallace, 206, it was decided that a tax may be imposed upon a corporation itself, measured by an arbitrary rule.

It was there held that a tax may be imposed by a State upon a corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value is assessed, and the rule of taxation, however arbitrary or capricious, are mere matters of legislative discretion.

A tax upon a corporation may be graduated upon income received, as well as the value of the franchises granted or the property possessed. Ibid.

The exercise of the authority which every State possesses to tax its corporations and their property and their franchises, and to graduate the tax upon the corporations according to their business or income or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports or tonnage, or transportation to other states, cannot be regarded as conflicting with any constitutional power of Congress. Ibid.

The fact that the corporation, plaintiff in error, uses vessels and

navigates the natural highways of the country, makes it no less liable to a corporation tax than if it were a railroad company, nor does it affect our position, that the taxation may indirectly or ultimately affect the commerce carried on, or the instrument used therein.

"Vessels are taxable as property, and possibly the tax may be measured by the capacity, when they are taxed only as property and not as vehicles of commerce." Cooley v. Taxation, p. 61.

In the case of Howell v. The State of Maryland, 3 Gill (Md.), 14, the court of appeals say that property in ships and vessels before the Federal Constitution was adopted was within the taxing power of the State, and they held that such property since that time when belonging to a citizen of a State living within her territory, and subject to her jurisdiction and protected by her laws, is a part of his capital in trade, and like other property, is the subject of state taxation.

The enrollment and licensing of the ship under the navigation laws of the United States were in that case alluded to, and it was held that the American ownership of a vessel and her natural character is ascertained not by her license, but by her enrolment. It shows that the regular proof of ownership and character has been given. The license authorizes the owner of the vessel to carry on the coasting trade and navigate the waters of the United Seates.

In Morgan v. Parham, 16 Wall., 476, the vessel plying between Mobile and New Orleans was admitted to be taxable in the State of New York, the place of the residence and registration of the owner, although enrolled as a coaster in Mobile and her license there renewed from time to time, and it was said that "this vessel, although an instrument of commerce, was not exempt from taxation on that score. A steamboat or a post coach engaged in local business within a State may be subject to local taxation, although it carry the mail of the United States. The *commerce* between the States may not be interfered with by taxa-

tion or other interruption, but its instruments and vehicles may be."

Steamboats which ply between different ports on a navigable river may, under a state statue, be taxed as personal property by the city where the company owning them has its principal office and which is their home port, *although they are duly enrolled and licensed as coasting vessels under the laws of the United States, and all fees and charges thereon demandable have been duly paid.* Transportation Co. v. Wheeling, 99 U. S., 273.

Alluding to the position of the plaintiffs in that case, the Court said "their proposition is that ships and vessels when duly enrolled and licensed for the coasting trade are not subject to state taxation in any form, and that the owners of the vessels cannot be taxed for the same as property, even when valued as other personal property as the basis of State or municipal taxation. Opposed as that theory is to the settled rule of construction that the commercial clause of the Constitution neither confers, regulates nor prohibits taxation, it is not deemed necessary to give the theory much further consideration. *Gibbons v. Ogden.* By that authority it is stated that the power to tax and the power the power to regulate and prohibit taxation are given in the Constitution by separate clauses, and that those powers are altogether separate and distinct from the power to regulate commerce; from which it follows as a necessary consequence that the enrollment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property upon a valuation of the same as in the case of other personal property."

The Steamship Company in the present case is a corporation of Pennsylvania, receiving from that State its corporate existence and franchises, and in contemplation of law a citizen and inhabitant of that State. Its franchises, as we have already shown, are property subject to taxation. The employment of its vessels in trade, along the coast and with foreign ports, does not take away the liability of the franchises of the corporation to be taxed where

that property is regarded as situated any more than the employment of its vessels outside of the limits of the State would deprive that state of the power to tax them as another species of personal property of the same owner. The corporation owns vessels and it owns its franchises as a corporation. These are two kinds of personal property, and each is taxed as such without regard to the fact that they are involved in and devoted to the pursuit of inter-state and foreign commerce. Indeed, the corporation may be taxed as such in consideration of its receiving its corporate existence and privileges, and as possessing therein an interest, or item of property, and there would be even a less direct interference with its operations in commerce than in the taxation of its vessels.

The case of Hays vs. Pacific Mail Steamship Company, 17 Harr. 596, also recognizes the taxability of vessels, *although enrolled under the laws of the United States.*

It is true no franchise or grant of corporate powers is needed to enable a person to use the highway of the seas, but such franchise is certainly needed to enable a number of persons to do that or any other business with the privileges, immunities and advantages of a corporation. It is scarcely necessary to instance among others, as an example, the advantages of a joint adventure of capital and labor without the individual liability and inconveniences of a simple partnership. The argument however is made on the other side that the water ways and high seas are natural highways and that any owner of vessels may navigate them upon complying with the laws of the United States as to registration, enrollment and license; that the right to navigate the same is a liberty received from the federal government. But the necessity of enrollment and license in the case of coasting and foreign trading in vessels is not so much a grant of privilege as it is a reasonable regulation of a right recognized as already existing in all persons.

No charter of incorporation in like manner is needed to enable persons to engage in the business of express carriage, messenger ser-

vice, stage coaching and the like. Any individual may use either the ordinary roads or streams of the State within and to points beyond the State lines. and yet if incorporated for that purpose as men may be, such corporation would be subject to taxation for and upon its franchises. Will it be said that because no franchise is needed to transport over the rivers or public roads of the country, which are highways already to hand and with the construction and control of which such carriers have nothing to do, that therefore when incorporated they may not be taxed as corporations for the franchises they receive from the State? The right to make and own a highway may or may not be a part of the franchises of a carrying company, but because it may not have as large privileges and powers as a railroad or canal company, shall not the remainder of its franchises and such as it has, be taxed as a valuable interest?

The mistake of the opposing counsel is that he fails to observe the distinction between a franchise or privilege to sail a ship or engage in commerce by the employment of any of its usual instrumentalities, and the franchise or liberty to sail ships or engage in commerce *as a corporate body.*

The right to navigate the seas is a natural right, just as is the right to locomote upon land in carriages, stages, or by foot, and to carry packages and merchandise for hire. Both are subject to regulation. In the first case the federal government exercises the right to regulate for the purpose of conserving and controlling this right, as also it has recently done, to some extent, in the case of railroad carriage in the enactment of the inter-state commerce bill.

The power of the State to tax in the one case is no more taken away than it is in the other.

We fail to see the difference between the case of vessels plying upon the navigable waters of the United States and a railroad company operating over an artificial highway for the purposes of the present argument. If there is, and steamship companies are

exempt for that reason from taxation upon its franchises, then an express company, or messenger company, or stage coach company would be exempt for the same reason if their business embraced inter-state traffice, for they, as in the case of vessel owners, use the natural or artificial highways of the ~~company~~ country already at hand, and which all may use. The use of a public road or a river by travellers engaged in business, or in pursuit of recreation, is in all essential respects the same. The mere accident that one is solid and the other liquid, does not affect the similarity of conditions in respect to the question now before us.

Because no franchise is required to enable a citizen of a State to carry packages by hand, or in carriages, or boats, shall it be said that when a corporation is erected with power to do such business they shall not pay a corporate tax whether in the shape of an arbitrary sum or in the more equitable shape of a tax adjusted to the extent of the business done, ascertained by reference to the receipts or earnings? And will such corporations be any less exempt from such taxation because their operations include carriage beyond the State boundary?

It is not necessary to contend that this is an occupation tax or a tax upon the receipts as property. It is only necessary to clearly bear in mind that it is a tax upon the corporate franchises and that the adjustment thereof upon the basis of gross receipts is only an equitable measurement of the value of the franchise or privilege to exist as a corporation.

We need only allude to the cases of Society for Savings vs. Coite, 6 Wall 611, cited *supra*, and Hamilton Co. v. Mass., 6 Wall. 632; Home Ins. Co. vs. New York, 119 U. S. 129, as illustrating this point.

This matter may be further illustrated in the language of Chief Justice Agnew in Ins. Co. vs. Com. 6 Norris 173, in defending the right of the State to tax one of its corporations. "It derives its faculties from our law and its power to go out of the State in pursuit of business elsewhere, it obtains from this State alone.

This faculty of action or power to go elsewhere is a home franchise and is not conferred by the law of another State by whose permission it *exercises* the franchise within it. It is this franchise —the power to make money by its business at home and abroad which this State assumes the right to control as of right, and the *burthen imposed is the price it must pay for the faculty and powers thus conferred.* By the exercise of this franchise it collects the fruits of its business no matter where it is performed. The money which finds its way into its treasury is the product of these powers conferred by this State. In view of the *corporate being thus conferred, the powers thus derived, and the products thus gathered,* the State necessarily possesses the power to tax the products of its corporate business, for none of them possesses in the slightest degree an outside character or interest."

The case of the State Tax on Railway Gross Receipts, 15 Wall. 284, clearly controls and rules the present case. The fact that it was a railroad company is only an incidental and non-essential difference, as will readily be seen by a mere reading of the case. It was there held that the tax in question being under a statute in all material respects identical with the present one, and intended to embrace all transportation companies, was a tax upon the corporation, measured by the fruits of its business, as ascertained after they were mingled with its property in the possession of the company, and at intervals of six months.

It is better to quote from the opinion than to attempt to give its substance in order to develop the true ground upon which it was based.

This Court there said, with reference to the question as to whether the tax in controversy was an invasion upon the federal power to regulate commerce, "The answer which must be given to it " depends upon the prior question whether a tax upon gross receipts " of a transportation company is a tax upon commerce so fas as " that commerce consists in moving goods or passengers across State " lines. No doubt every tax upon personal property or upon oc- " cupations, business or franchises, affects, more or less, the subjects

"and the operations of commerce. Yet it is not everything that "affects commerce that amounts to a regulation of it, within the "meaning of the Constitution. We think it may safely be asserted "that the States have authority to tax the estate, real and personal, "of all their corporations, including carrying companies, precisely "as they may tax similar property when belonging to natural per- "sons, and to the same extent. We think, also, that such taxation "may be laid upon a valuation, or may be an excise, and that in "exacting an excise tax from their corporations the States are not "obliged to impose a fixed sum upon the franchises, or upon the "value of them, but they may demand a graduated contribution, "proportioned either to the value of the privilege granted, or to "the extent of their exercise, or to the results of such exercise. "No mode of affecting this, and no forms of expression which "have not a meaning beyond this, can be regarded as violating the "Constitution." Then, after adverting to the distinction between tax on freight, or the price of transportation, and tax upon gross receipts, ascertained at semi-annual periods, after they have come into the possession of the company, and showing that such tax in the latter is not upon commerce, but upon a subject which has lost its distinctive character as freight and became mingled with the property of the corporation, the Court thereby shows that it is practicably upon the fruits of the business, and not upon the business itself. It is not necessary to determine whether the Court meant to place this part of its opinion upon the idea of its being a property tax, or as an argument to show that the basis of the taxation was analogous to such tax, and that such basis was withdrawn from the conditions of a tax upon freight. The Court finally goes on to say, however: "It is not to be "questioned, however, that the States may tax the franchises of "companies created by them, and that the tax may be propor- "tioned either to the value of a franchise granted or to the "extent of its exercise; nor is it deniable that gross receipts may "be a measure of proximate value, or if not, at least of the extent "of the enjoyment: If the tax be, in fact, laid upon the companies,

"adopting such a measure, imposes no greater burden upon any "freight or business from which the receipts came than would be "an equal tax laid upon a direct valuation of the franchise. In "both cases the necessity of higher charges to meet the exaction is "the same."

Commerce over the railroads of the country is just as much commerce within the meaning of the Constitution as commerce over the water ways. The question to be determined is not whether commerce is affected, but whether it is controlled or operated upon directly by the taxing power. The character of the highway cannot determine this question, nor can it depend upon whether the traffic is carried on by a boat or a car. If the taxation is upon the tonnage or feights or fares, it is an interference with the commercial power. If it be taxation upon a valuation of the fruits of the business after they have become mingled with its property it is not obnoxious to the federal prohibition.

In the present case the greater part of the trade was between the cities of Philadelphia and Savannah. Now, suppose the same trade, involving precisely the same merchandise, had been carried on by means of railway cars between the same points, it would unquestionahly have been within the ruling of the Railway Gross Receipts case. Surely it cannot be successfully contended that because it was carried in a ship instead of a railway car a different principle will be applied, and that for that reason alone it is not governed by the last cited case. The inconsequential character of such an argument will more forcibly appear when it is remembered that the ship itself may be taxed as personal property.

The case of Railroad Company vs. Maryland, 21 Wallace, 456, does not justify the use made of it by the other side.

It must be borne in mind that in that case the right claimed by the State was to take and receive from the company, which was conceded as having been largely devoted to inter-state travel, one fifth of the total amount received for the transportation of passengers under a stipulation in its charter received from the State of

Maryland and which was a condition of its corporate existence. For the privilege of being endowed with the right of eminent domain and the power to construct a work which the State itself might build, the corporation as a part of its charter agreed to give to the State a part of what the State might have wholly reserved. The State gave up its power to construct the highway itself to the corporation, and as a price therefor reserved a portion of the tolls which it might have earned for itself if it had itself commenced and operated the railroad. The opinion of Judge Bradley is with reference to this aspect of the case, and the remarks as to the difference between artificial highways, such as railroads, and natural highways, such as rivers and seas, were evidently with reference to the fact that the State had delegated a part of its power to construct, control and reap profits from an artificial highway, reserving a part of the profit to itself. There is nothing in that case that can be construed into a departure from the case of The Railway Gross Receipts or as laying down the doctrine that the right of the State to tax a corparation or its franchises generally upon the basis of the gross receipts is limited to the case of railroad companies or companies having the power to construct and operate an artificial highway.

The Railway Gross Receipts Case and the present case are both under a general statute imposing a tax upon transportation companies generally. They are both alike cases of taxation upon the franchises of carrying companies according to a certain measurement, and therefore the remarks of Judge Bradley in the case in 21 Wallace would not be directly applicable here.

The cases of Grover & Baker Sewing Machine Company vs. Butler, 53 Ind. 454; Shook vs. The Singer Manufacturing Company, 61 Ind. 520, and *ex parte* Robinson, 2 Biss. 309, are clearly not applicable.

The present case is not in any way analogous to the case of an attempt to restrain limit or regulate the transaction of business in manufacturing and selling patents. It may be even conceded that

the imposition of conditions and restrictions upon corporations exercising such business would not be valid without in any way affecting our present contention.

Granted that the right to navigate the navigable waters of the United States are free to all, subject only to the regulations imposed by the navigation laws, the right to tax the property or franchises is not a restraint, condition or limitation on the operations or business of navigating any more than such tax is a limitation on the operation of, or carriage upon a train of railway cars. Any restriction or limitation, such as requiring a license or enrolment, or payment of port fees for the privilege of passing through the harbors, rivers or other waters of a State would be an analogous case, and these requirements of course could not be sustained. That a tax might indirectly affect the commerce in question, by increasing its burdens or rates is, as shown in the cases cited, no valid objection to its collection, and therefore for that reason, could not be an objection in the present case.

This would be so even if the United States conferred the right of navigation instead of merely licensing and regulating it.

Whether, therefore, the Railway Gross Receipts Case and others which have followed and accepted its conclusions, be regarded as sustaining such a tax upon the corporation franchises whose value is measured thereby, or upon such receipts as property received into its possession, the right of taxation in the present case may be regarded as having been thereby finally settled. To refuse to sustain the right of taxation upon the gross receipts of Steamship Companies would necessitate a direct overruling of the solemn adjudications of this Court, for there is no rational distinction which can be drawn to take this case out of the operation of the principles heretofore announced.

II

Even if we were to regard this as a property tax, it is respectfully submitted that the broad scope given to the fourteenth

amendment in the County of San Mateo vs. The Sauthern Pacific Railroad, 13 Fed. Rep., 722, is not sustainable on principle or reason.

In the Slaughter House Cases, 16 Wall., 36, 81, this Court says: "In the light of the history of these amendments and the pervading purposes of them which we have already discussed, it is not difficult to give a meaning to the clause. The existence of laws in the States where newly emancipated negroes resided which discriminated with gross injustice and hardships against them as a class was the evil to be remedied by this clause and by it such laws are forbidden. * * * We doubt very much whether any action of a State not directed by way of discrimination against negroes as a class or on account of their race will ever be held to come within the purview of this provision."

But even if we concede that the fourteenth amendment has restricted the States in the exercise of the taxing power the decision in the San Mateo case does not affect the power of the State to classify the subjects of taxation whether they be things or persons. It is only necessary that the tax imposed be uniform and equal as to the class upon which it operates. State Railroad Cases, 92 U. S., 575, 611.

Perfect equality, of course, is unattainable.

"Perfectly equal taxation will remain an unattainable good as "long as laws and government and man are imperfect."—Sharswood, J., in Grim vs. School District, 7 Smith, 434–439.

Perfect equality in the assessment of taxes is unattainable. Approximation to it is all that can be had.—Cooley on Taxation, p. 127.

Classification of the subjects of taxation may be based upon the physical conditions and differences of property itself, or upon the character and relations of its owners. In other words there may be classification of *persons* or *things*, provided it be not arbitrary or capricions, but follows some rational and convenient

principle which naturally collects them into their proper association.

"Class" is thus defined in Webster: "A group of individuals "ranked together as possessing common characteristics."

In Durach's Appeal, 12 Smith, (Pa.) 491, it was said: "That in "the legitimate exercise of the power of taxation *persons* and *things* "always have been and may constitutionally be classified. No "one has ever denied this proposition. To hold otherwise would "logically require that all the subjects of taxation, as well persons "as things, should be assessed and an equal rate laid *ad valorem*. "Practically no more unequal system could be contrived. * * * "If taxation is *upon all of a class either of persons or things*, it "matters not whether those included in it be one or many, or "whether they reside in any particular locality or are scattered "all over the State."

In the case of Kittanning Coal Company vs. Commonwealth, 29 Smith, (Pa.) 100, 104. in expressly commenting on the IXth section of the new Constitution, the Supreme Court of Pennsylvania declared that the power to classify *persons* as well *things* is not taken away by that Constitution, and that inequality will best be avoided by such classification.

The same was held in Kitty Roup's case, 32 Smith, 211.

In Wheeler vs. City of Phila., 27 Smith, 349, Judge Paxson, in asserting the general power of classification as a constitutional principle, says: "For the purpose of taxation real estate may be "classified. Thus timber lands, arable lands, mineral lands, "urban and rural, may be divided into distinct classes and sub-"jected to different rates. In like manner other subjects, trades, "occupations and professions may be classified. And not only "things, but *persons* may be so divided. The *genus homo* is a "*subject*, within the meaning of the Constitution. Will it be "contended that as to this there can be no classification?"

From the necessities of the case, and because of the essentially

different character and constitution of *artificial bodies* from *natural persons*, it has been the general policy and practice of all civilized States to deal differently with these two great classes. The nature of their privileges and obligations, their vast opportunities from accumulation of capital to build up power and wealth, their ramifications through the frame of society, and the intangibility of their most valuable possessions, to wit: their franchises, all combine to impress upon the legislative mind the necessity and justice of dealing with corporations as a distinct class from individuals. The law-making power has so dealt with them through all our history, and to reduce them down to a dead level with individuals and taxing them only upon what is taxed in the possession of individuals, and *vice versa*, will produce the very inequality and disproportion of burden of which so loud a complaint is often made.

It is conceded on the other side that taxation on the gross receipts of railroads might be treated as a classification of subjects which would only call for equalization between all railroads. If so, why may not taxation upon the gross receipts of all transportation companies be treated as within the principle of classification whether we regard them as artificial distinguished from natural persons, or as a certain class of corporations engaged in the occupation of carriers. Steamship carrying companies may be just as much regarded a class as railroad companies.

But the San Mateo case, even if sustained in all its breadth by this Court, can certainly have no application here, and we are not obliged to invoke the principle of classification because in the light of the earlier part of this discussion it is not necessary to regard the tax on gross receipts as a property tax, but a tax on the franchise of the corporation, a peculiar kind of intangible property possessed only by corporations and not predicable of individuals or natural persons.

It is respectfully submitted that to carry the operation of the commercial clause of the federal constitution to the lengths contended for by the other side, would be to take a long stride toward